BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION BELOW.

The opinion of the Court of Appeals appears at pages 473 to 483 of the record. The order and judgment affirming the order of the District Court is at pages 483 and 484, and the certificate of the Clerk of the Circuit Court of Appeals is at page 504 of the original record filed herewith and at pages 500 and 501 of the other copies filed.

II.

JURISDICTION.

1. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, now being Section 347 (a), Title 28, U. S. Code.

2. The date of the judgment of the trial court is March 14, 1941 (R. p. 27). Motion for judgment notwithstanding the verdict was overruled on April 7, 1941 (R. p. 466). An appeal was duly perfected and there was a judgment in the Circuit Court of Appeals on October 13, 1941 (R. pp. 483-484).

III.

STATEMENT OF THE CASE.

In the petition, at pages 1 to 8, is a full statement of the case, so far as the law and the facts are material to a consideration of the questions here presented. In the interest of brevity this statement is not repeated.

IV.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals for the Eighth Circuit erred:

1. In holding that the fact of the injury to respondent is, in and of itself, deemed to afford sufficient evidence to support recovery.

V.

SUMMARY OF ARGUMENT.

I.

A.

SPECIFICATION OF ERROR.

It conclusively appears from the record that respondent's duties as car inspector included the duty of inspecting the freight car door and its appliances, and of determining from his inspection whether there was any defect which would make it unsafe to attempt to close the door without first having it repaired. If, in the opinion of respondent, the door, or its appliances, was defective and needed repairing, it was his duty to place a "bad order" card on the car and send it to the railroad shop for repairs.

It also appears conclusively from the record that respondent's employers, petitioners herein, had no means of knowing the condition of the door or its appliances, except through respondent.

Furthermore, respondent did inspect the door and its appliances; he discovered nothing wrong; and if there had

been anything wrong with the door that an inspector could have found, he could have found it.

It cannot be disputed, and it is not disputed, that respondent had actual physical control of the door and its appliances, and was prying up under the center of the door when it came loose from its track and fell and struck respondent. Such fact is clearly established by the record.

The record is absolutely silent as to the existence of any defect in the door or its appliances. And if it be surmised that the door fell because of a defect, it was one which respondent himself could not and did not find. If it be assumed, for sake of argument, that a defect existed at the time of the accident, there is no showing that petitioners had any opportunity to discover it, or that they could have discovered it, before the accident by the most careful examination and inspection. The undisputed evidence is that the car door was in good condition at the time and after the train left Kansas City on the morning of the accident, and that it was opened and closed several times without difficulty during that day. The first time the door was found to be open was when the train was at Huntsville, Missouri, seven miles from the railroad yards, at Moberly, where the accident occurred, and no member of the train crew observed any defect at Huntsville, nor at any other time or place. It is admitted that the mere fact that a car door is stuck and will not close is no evidence that it is defective, which fact is declared in the opinion of the Court of Appeals (R. p. 474).

There is no showing that petitioners, or any officer, agent or employee of petitioners, was negligent in any respect, or that respondent's injury resulted in whole or in part from the negligence of any of the officers, agents or employees of petitioners, or by reason of any defect or insufficiency, due

to their negligence, in the cars, doors, appliances or other equipment. Without a showing of negligence there can be no recovery under the Federal Employers' Liability Act.

Therefore, the Court of Appeals erred in holding that "the fact of the injury itself is deemed to afford sufficient evidence to support recovery in the absence of explanation by the defendant tending to show that the injury was not due to its want of care."

The testimony in this case leaves the question unanswered as to why the door fell, and whether it fell because of a latent defect, or whether respondent pried it loose, or whether it fell for some other reason, and where the testimony thus leaves the matter uncertain and shows that the injury may have resulted from some cause for which the employer is responsible, or may have resulted from some cause for which he is not responsible, it is error to permit the jury to guess between the causes.

In holding, under the circumstances disclosed by the record in this case, that the fact of the injury furnishes a sufficient basis for an adjudication of negligence, the opinion of said Circuit Court of Appeals upsets a long line of its own decisions, runs contrary to the decisions of at least eight of the ten circuits, and is in direct conflict with the decisions of the Supreme Court.

> "On such a state of facts the jury should not have been permitted to conjecture * * *. The evidence must at least point to the essential fact which the jury is required to find in order to sustain the verdict."
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> **St. Louis-San Francisco R. Co. v. Mills,** 271 U. S. 344, 347, 348, 70 L. Ed. 979, 982.

> "And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury * * *, it is not for

the jury to guess between these half a dozen causes and find that the negligence * * * was the real cause, when there is no satisfactory foundation in the testimony for that conclusion."

Patton v. Texas & P. R. Co., 179 U. S. 658, 663, 45 L. Ed. 361, 364.

"The record leaves the matter in the realm of speculation and conjecture. That is not enough."

Chicago, Milwaukee & St. Paul R. Co. v. Coogan, 271 U. S. 472, 478, 70 L. Ed. 1041, 1045.

"As often pointed out one who claims under the Federal Act must in some adequate way establish negligence and causal connection between this and the injury."

Atchison, Topeka & Santa Fe Ry. Co. v. Saxon, 284 U. S. 458, 459, 76 L. Ed. 397, 398.

ARGUMENT.

The material facts necessary for a decision of the issues here presented are clear and undisputed. All the facts and occurrences with which we will deal took place on July 12, 1939.

On that day the freight train with which we are here concerned left Kansas City, Missouri, about 7:15 in the morning. It arrived at Moberly, Missouri, some time after 10 o'clock that night. Wabash car 45034 was a part of that train. The distance from Kansas City to Moberly, Missouri, is 125 miles, and the train took fifteen hours or more to make the trip, because it stopped at several stations where cars were loaded and unloaded. The offending door on Wabash car 45034 was opened and closed several times between Kansas City and Huntsville, Missouri, a station between Kansas City and Moberly, and about seven miles west of Moberly. At Huntsville it was noticed that the car door was open, and members of the train crew attempted to close it, but were unable to do so. The crew noticed nothing defective or out of order about the door or its appliances, and as there were no railroad shops at Huntsville, and also as the train crew were not going to leave the train until they got to Moberly, they proceeded on with the door open on Wabash car 45034, and when the train arrived at Moberly one of the members of the train crew, a brakeman, notified respondent that the door was open.

Respondent had been employed as a car inspector at the Moberly railroad yards for more than eighteen years, during all of which time his duties consisted of making so-called "running inspections" of the equipment on trains as the trains moved through the yards, or as they were standing in the yards. His duties also included the inspec-

tion of freight car doors and their appliances, and the closing of open doors. He was called upon to close, or assist in closing, many doors each day—perhaps as many as eighty a day. The mere fact that a door on a freight car was open and was stuck so that it could not be closed without application of an unusual amount of force did not indicate that there was any defect in either the door or its appliances. Sometimes doors on new cars would be stuck. Small pieces of coal, or wood, or other foreign objects, would get under the hanger wheels at the top of a door and would prevent the door from being closed by application of the usual amount of force.

During all of the eighteen years that respondent had worked as a car inspector in said railroad yards, he never closed a door without first inspecting it and its appliances, including the hangers by which the door was suspended from the track over the door opening. If his inspection disclosed any defect that would prevent the closing of a door, or that would make it unsafe to close a door, it was respondent's duty to put a bad order mark on the defective door and send the car to the shop for repairs. If, however, he discovered no defect or other condition that would interfere with the closing of a door, and found nothing that would, in his opinion, make it unsafe for him to close the door, or attempt to close it, by prying on it with an iron crowbar, he would utilize the crowbar in such way as he saw fit, in his efforts to close the door. A crowbar was furnished by the railroad for respondent's use, but whether he would use it, and how he would use it, was a matter that was left entirely to his own judgment. He testified that on the night of July 12th he looked at the door and the door hangers "to see if there should be anything wrong at the top" (Rec. pp. 177, 178); that he looked "to see whether the roller was off the track at the top of the door"; that it was "a customary practice" with

him to do so, and was "a habit formed by inspectors," and "a part of the inspection of cars" (Rec. p. 180). He further testified that before attempting to close a door by prying up on it with a crowbar he "would make my own personal inspection of the hanger and use my own judgment" (Rec. p. 184), in order to determine whether he could safely use the crowbar on the door, or whether he should mark the car "bad order" and send it to the shop for repairs. He testified that it was part of his job as car inspector to determine whether it was safe to close the door before he started to work on it (Rec. p. 189), and if there had been anything wrong with the door that any inspector could have found, he could have found it (Rec. p. 195).

On the night in question respondent, as stated, inspected the door by looking at it and its attachments, including the door hangers and the track at the top of the door opening on which the hangers operated, and saw nothing wrong with the condition of the door or its attachments, and saw nothing to indicate that there was anything wrong with the door or its attachments. To the contrary, the door looked like a good door, and looked all right to him, as far as he could see (Rec. pp. 179 and 183). Respondent testified that the work of inspecting a car required a car inspector to "train his eyes to observe any things and take in the entire contents of the car from the outside appearance" (Rec. p. 180), and over the course of years that he worked as such car inspector he became well acquainted with how snugly a door will fit up against the side of a car when it is in proper shape (Rec. p. 178).

On the night in question, after the brakeman had notified respondent that the car door was open, the first thing he did was to proceed to the car, and, with the help of another inspector and a railroad patrolman, tried to push the door shut with their hands without using a crowbar,

but they were unable to move it. Another train was standing on an adjoining track, and not more than two or three feet away from the train which respondent was inspecting, and respondent and his companions decided they would wait until that other train pulled out before making a further effort to close the door on Wabash car 45034. After the train on the adjoining track had pulled out, respondent and his two companions returned to the car, bringing with them another railroad patrolman, and a further effort was made to close the door. This time the second patrolman climbed on top of the car and shined his flashlight on the hangers, and tapped the hangers with a hammer which respondent loaned him. Respondent remained on the ground.

To this point the evidence is without dispute, and is all a resume of the facts as given in evidence by respondent and the witnesses produced by him.

Petitioners produced as witnesses the car inspector who accompanied respondent, and the two patrolmen. The patrolman who got up on the car and the other inspector testified that when the patrolman shined his flashlight on the hangers at the top of the door he told respondent that one of the hangers was off the track (Rec. pp. 340, 360). The other patrolman was not there at the time, as he had been sent by respondent to get the crowbar from the inspectors' shanty (Rec. pp. 350, 351).

Respondent testified that the patrolman said nothing to him about the hanger being off the track (Rec. p. 182), and, so far as respondent could remember, said nothing at all about what he saw, and nothing about the condition of the door, the hangers, nor the track (Rec. p. 183).

At any rate, the evidence shows that after the patrolman came down from the top of the car respondent took the crowbar and assumed a position at the center of the door.

He then applied the crowbar under the center and pried up on the door while the other car inspector pulled on a handle at the front, and the two patrolmen pushed on the door at the back, and while they were thus engaged the door hangers came entirely off the track and the door fell on respondent, striking him and breaking his back and inflicting other injuries.

We revert to the fact that the only bit of disputed evidence is the dispute about whether the patrolman who went on top of the car told respondent that the hanger was off the track. Every other fact mentioned is undisputed, and there is no testimony anywhere in the record to indicate that any other stated fact is untrue.

We also invite the Court's attention to the fact that there is not one scintilla of evidence that the door, the door hangers, the track on which the hangers operated, or any appliance of the door, was defective in any respect that would contribute, or might have contributed, to cause the door to fall. Neither is there any evidence to be found in the record that petitioners, or any of the officers, agents or employees of the railroad company were negligent in any respect, or that they performed any act or that they did anything, or failed to do anything—negligent or otherwise—that contributed, in any degree, to the fall of the door.

In this state of the record the District Court sent the case to the jury with an instruction that they might find that petitioners were negligent if they found "that the car door or its supporting appliances were defective," that a defect "caused the door to fall and that the means of knowing what kind of defect, if any, caused the door to fall was exclusively and entirely within the knowledge and control of the defendant (petitioners) and was not known by plaintiff (respondent) or readily determinable by plain-

tiff (respondent),'' telling the jury that such ''fact, if it be a fact,'' was ''sufficient circumstantial evidence to permit a finding by you that the defendant (petitioners) was negligent'' (Rec. pp. 450, 451).

On appeal to the Circuit Court of Appeals for the Eighth Circuit, as well as in the District Court, petitioners contended that such an instruction was erroneous; that the undisputed evidence, as disclosed by the record, established conclusively not only that respondent, and not petitioners, was in charge and control of the door, but that petitioners had no ''means of knowledge'' as to the condition of the door, and no way to obtain any knowledge as to its condition except through the respondent himself, who was employed by petitioners for the very purpose of ascertaining the condition of an open car door, and determining whether such open door could be or should be closed, or whether the car should be sent to the repair shop for repairs on the door if its condition was defective.

This case was pleaded, tried, and submitted to the jury on the theory that the doctrine res ipsa loquitur applied. Petitioners contended in the District Court, and in the Circuit Court of Appeals, and still contend that the doctrine cannot be applied under the facts and circumstances shown in this case. And petitioners further contend that even if the evidence presented a case for the application of the rule of res ipsa loquitur, it was improperly applied in this case in that both the District Court and the Circuit Court of Appeals ruled that the mere fact that the door fell, without any showing as to why it fell, constituted evidence that petitioners were negligent. The District Court permitted the jury to find that the door fell because of petitioners' negligence if the jury found ''that the fact, if it be a fact, that the car door or its supporting appliances were defective caused the door to fall, and that the means of knowing what kind of defect, if any, caused the door to

fall was exclusively and entirely within the knowledge of the defendant" (Rec. p. 450), without there being any evidence whatever of a defect in the door or its supporting appliances, and without there being any evidence from which the jury could have found that petitioners had any "means of knowing," before the accident, what caused the door to fall. The Circuit Court of Appeals declared in its opinion that "the fact of the injury itself is deemed to afford sufficient evidence to support recovery in the absence of explanation by the defendant tending to show that the injury was not due to its want of care" (Rec. p. 477), notwithstanding there was no evidence of negligence.

The Federal Employers' Liability Act is not a workmen's compensation act, and an employer is not an insurer under the act. It does not make the employer liable for every injury resulting to an employee while engaged in interstate commerce, but only for an injury "resulting in whole or in part from the **negligence** of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its **negligence**, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment" (U. S. C. A., Title 45, Chapter 2, Sec. 51; Apr. 22, 1908, c. 149, sec. 1, 35 Stat. 65). At the time respondent was injured on July 12, 1939, employees engaged in interstate commerce assumed certain risks of their employment, which fact was recognized by the District Court in its charge to the jury (Rec. pp. 452, 453). The amendment eliminating assumption of risk as a defense in cases arising under the Federal Employers' Liability Act was not adopted until August 11, 1939. Therefore, if the injury to respondent on July 12, 1939, was due to a risk which he assumed, the petitioners would not be liable. Most Circuit Courts of Appeals, including the Eighth Circuit, have heretofore consistently refused to apply the doctrine of res ipsa loquitur in any master

and servant case, whether it arose under the Federal Employers' Liability Act or not. The Circuit Court of Appeals of the Eighth Circuit has been outstanding in its strict adherence to that rule, and in March, 1940, Judge Woodrough, who concurred in the opinion about which we here complain, spoke for the Eighth Circuit Court of Appeals as follows:

> "It is recognized at the outset that prior to the decision of the Supreme Court in Erie v. Tompkins, supra, the federal courts in this and other circuits had followed the declaration of the Supreme Court in Patton v. Texas & Pacific, 179 U. S. 658, 21 S. Ct. 275, 45 L. Ed. 361, and had refused to apply the doctrine of res ipsa loquitur in cases brought on behalf of servants claiming to have suffered injury through the negligence of their masters. This court in passing on such a case said: 'It is settled law that, as between a master and his servant, the maxim "res ipsa loquitur" has no application.' Shandrew v. C. St. P. M. & O. Ry. Co., 8 Cir., 142 F. 320, 323; Latting v. Owasso Mfg. Co., 8 Cir., 148 F. 369; Cryder v. Chicago, R. I. & P. Ry. Co., 8 Cir., 152 F. 417; Midland Valley Ry. Co. v. Fulgham, 8 Cir., 181 F. 91, L. R. A. 1917 E 1; Phillips Petroleum Co. v. Manning, 8 Cir., 81 Fed. (2d) 849."
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> **F. W. Martin & Co. v. Cobb,** 110 Fed. (2d) 159, 163.

And the Sixth Circuit, which has long held that the doctrine of res ipsa loquitur may be applied in master and servant cases (but only where the accidents speak for themselves, and permit of no other conclusion than that they resulted from negligence of the employer) has thus declared the law in a case arising under the Federal Employers' Liability Act in an opinion by Judge Denison:

> "It has long been established that, in actions by passengers against carriers, the occurrence of an injury (in the usual surroundings) made a prima facie case of negligence; while in actions by employes against

carrier the rule was otherwise. Inasmuch as the fact that many accidents are caused by the negligence of a fellow servant, thus preventing the accrual of a right of action to the injured employe, was one of the reasons for holding that the maxim res ipsa loquitur was not applicable to an action by an employe, and inasmuch as this situation has now been changed by statute in actions under the federal Employers' Liability Act, there is strong ground for saying that the old decisions, to the effect that the maxim can have no application in an employe's action, are not here to be observed. We are quite content to assume the correctness of this position; but, when we concede that the maxim may apply to such an action, it by no means follows that it does apply to the same extent and with the same force as in a passenger action. The distinction is obvious. Passenger actions involve a duty to exercise a very high degree of care, amounting almost to insurance, and the instances where the accident does not depend upon some negligence of the railroad or of some employe are so rare that a general rule may well rest upon the general fact. In an employe's action, the defendant's obligation is only to use ordinary or due care to provide a safe place to work or proper instrumentalities and methods, and **it must be admitted that an unknown, but considerable, fraction of the injuries to employes are either true accidents or assumptions of risk, or are proximately caused only by plaintiff's carelessness**; hence there is, in truth, no such common and dominant probability of negligence as in the passenger cases. We think we give the plaintiff in an employe's case all the benefit of the maxim to which he is entitled when we say that it may apply to aid him; but whether the event does speak, and what it says, depend upon the facts of the particular case."

Southern Ry. Co. v. Derr (C. C. A. 6), 240 Fed. 73, 75, 76.

And the Circuit Court of Appeals for the Eighth Circuit, in an opinion by Judge Walter H. Sanborn, said:

"But the doctrine, 'res ipsa loquitur,' is inapplicable to cases between master and servant brought to recover damages for negligence, because there are many possible causes of accidents during service, **the risk of some of which * * * the servant assumes * * *.** The mere happening of an accident which injures a servant fails to indicate whether it resulted from one of the causes the risk of which is the servant's, or, from one of those the risk of which is the master's; and for this reason it raises no presumption that it was caused by the negligence of the latter. In such cases the burden of proof is always upon him who avers that fact, and a naked finding, as in this case, that the accident occurred and that the servant was guilty of no negligence which contributed to cause his injury, is insufficient to sustain this burden, for there are many other causes than the negligence of the master and that of the servant, such as the negligence of fellow servants and latent and undiscoverable defects in place or machinery, which may have produced it."

Northern Pac. Ry. Co. v. Dixon (C. C. A. 8), 139 Fed. 737, 740.

The above cases, and all the cases cited in support of this petition for certiorari, are but declaratory of the rule announced by the Supreme Court in an opinion by Mr. Justice McKenna:

"To hold a master responsible, a servant must show that the appliances and instrumentalities furnished were defective. A defect cannot be inferred from the mere fact of an injury. There must be some substantive proof of the negligence. Knowledge of the defect or some omission of duty in regard to it must be shown."

Marian J. Looney, Administratrix, v. Metropolitan R. R. Co. et al., 200 U. S. 480, 50 L. Ed. 564, 568.

A leading case, and one which has been often cited by

the Supreme Court, and by the various Circuit Courts of Appeals, as well as by a majority of the state courts, is one in which Mr. Justice Brewer clearly distinguished between the case of a passenger against a railroad, and the case of an employee against a railroad, in the following language:

> "That while, in the case of a passenger, the fact of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which, in the absence of some explanation or proof to the contrary, is sufficient to sustain a verdict against him, for there is prima facie a breach of his contract to carry safely * * *, a different rule obtains as to an employee. The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence. Texas & P. R. Co. v. Barrett, 166 U. S. 617, 41 L. Ed. 1136, 17 Sup. Ct. Rep. 707. Second. That in the latter case it is not sufficient for the employee to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was."
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> **Patton v. Texas & Pacific Ry. Co.**, 179 U. S. 658, 663, 45 L. Ed. 361, 364.

Petitioners have shown that there was no evidence of any defect in the car door or its appliances. They have shown that there was no evidence that respondent's injury resulted "in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its (petitioners') negligence, in its cars, * * * appliances, * * * or other equipment." We have shown that without evidence of negligence contributing to respondent's injury, and without evidence of any defect or insufficiency, due to petitioners' negligence, in the car door, or in its appliances or other equipment, the question of whether petitioners

were negligent should not have been submitted to the jury. Further, it is shown by the evidence in this case that the car door and its appliances was not in control of petitioners at the time of the accident, but was in actual physical control of respondent, who was wrenching and prying up on it with a crowbar at the very moment the door fell.

In an almost identical case, where two employees were trying to open a car door, and a plate fell from the top and struck one of them on the head while the other was prying the door with a crowbar, the Circuit Court of Appeals for the Eighth Circuit held that plaintiff did not make out a prima facie case because it was as reasonable to say that the plate was caused to fall by the wrenching of the door against it, as it was to say that it fell because it was not firmly fastened in its mortised bed. **Copeland v. Chicago, B. & Q. R. Co.**, 293 Fed. 12, 16.

As recent as May 7, 1941, we find an opinion written by Judge Gardner, who wrote the opinion in petitioners' case, and concurred in by Judge Thomas, who concurred in the opinion in petitioners' case, wherein the Eighth Circuit Court of Appeals held in an action bottomed upon alleged violation of the Safety Appliance Act (45 U. S. C. A., Sec. 1 et seq.), and brought under the Federal Employers' Liability Act:

> "There was no proof of mechanical defect or insufficiency but only the statement of a witness who says that after the accident he tried to use the pin lifter without stating whether the trial was successful or what effort was included therein. A verdict cannot be permitted to stand which rests wholly upon conjecture or surmise, but must be sustained by substantial evidence. Midland Valley R. Co. v. Fulgham, 8 Cir., 181 F. 91, L. R. A. 1917 E 1.
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> "There being no substantial evidence to sustain the verdict, the judgment appealed from is reversed and the cause remanded with directions to grant the de-

fendant's motion for judgment in its favor notwithstanding the verdict."

Southern Railway Co. v. Stewart (on rehearing), 119 Fed. (2d) 85, 89.

The complaint in the Stewart case was that "the defendant had violated the provisions of the Federal Safety Appliance Act by furnishing on its line cars used in moving interstate traffic not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars."

How can the same Court hold that the mere failure of safety appliances to work properly constitutes no evidence of a defect in such appliances, and constitutes no evidence of negligence, and then hold that negligence may be adjudicated from the mere fact that a door (which is not a safety appliances), came loose from its moorings and fell on a car inspector while he was prying up on the door with an iron crowbar? Such holdings are entirely inconsistent, and the latter holding is inconsistent with and contrary to every pronouncement of that Court prior to May 7, 1941, and with the decisions of the Supreme Court and the other courts of the land.

The cases cited in support of this petition for certiorari are unanimous in their declaration that in cases between master and servant, where the servant alleges negligence, he must prove it. And this is true whether the case be one brought undr the Federal Employers' Liability Act or not. It is also true whether the plaintiff in the case relied upon the doctrine of res ipsa loquitur. That doctrine does not relieve the plaintiff employee of the burden of proof, nor does it have the effect of shifting the burden of proof to the defendant, as was declared in **Sweeney v. Erving**, 228 U. S. 233, 238, 57 F. Ed. 815, 818.

We submit that this case falls in the "peculiar class"

of cases referred to Mr. Justice McReynolds, when he said for the Supreme Court:

> "The cause is one of a peculiar class where we have frequently been obliged to give special consideration to the facts in order to protect interstate carriers against unwarranted judgments and enforce observance of the Liability Act as here interpreted.
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> "Examination of the record convinces us that the Court of Civil Appeals reached the proper conclusion. We can find no evidence from which it may be properly concluded that Moore's traffic death was the result of negligence by the Railway Company. As often pointed out, one who claims under the Federal Act must in some adequate way establish negligence and causal connection between this and the injury. New York C. R. Co. v. Ambrose, 280 U. S. 486, 74 L. Ed. 562, 50 S. Ct. 198; Atchison, T. & S. F. R. Co. v. Toops, 281 U. S. 354, 74 L. Ed. 899, 50 S. Ct. 281."
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> **Atchison, Topeka & Santa Fe Railway Co., v. Saxon,** 284 U. S. 458, 459, 76 L. Ed. 397, 398.

II.

CONCLUSION.

The question here presented is one that has arisen numerous times, and it appears from the Saxon case that the Supreme Court has frequently had occasion to take jurisdiction of cases of this kind in order to afford to railroad companies the protection to which they are entitled under the Federal Employers' Liability Act.

If the decision of the Court of Appeals in this case is permitted to stand, petitioners will suffer an irreparable and unwarranted injury, and much confusion will result from the decision.

Petitioners, therefore, respectfully pray that the petition

for certiorari be granted in this case to the Eighth Circuit Court of Appeals and that the judgment of said Court be reversed.

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N. S. BROWN,
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Of Counsel.

Wayne Ely, solicitor for petitioners, certifies that the foregoing petition for certiorari is filed in good faith and is believed to be meritorious.

Dated at St. Louis, Missouri, this 19th day of October, 1941.

Wayne Ely.